No. 3936.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

In the Matter of

J. H. McNEICE and FRED McNEICE, Individually and as Copartners, Doing business under the name and style of McNEICE FURNITURE CO., Bankrupts.

DOLPH BARNETT, as Trustee of J. H. McNEICE and FRED McNEICE, Individually and as Copartners, doing business as McNEICE FURNITURE COMPANY, Bankrupts,

Appellant,

vs.

O. A. SPROAL,

Appellee.

REPLY BRIEF OF APPELLANT

LOGAN ROBERTS,
ROBERTS & ROBERTS,
NELSON R. ANDERSON,
Attorney for Appellant.

1723 L. C. Smith Building
Seattle, Washington

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NELSON R. ANDERSON,
Attorney for Appellant.

Brief of appellee, page 2, states that all creditors objected to the landlord voting his claim upon the ground that said claim was preferred. This statement is not borne out by the record. The record, page 21, contains the ruling of the Referee that he did not pass upon the question whether the claim should be voted or not. Besides, it is perfectly obvious that the claim filed, being for the most part an expense of administration, was not a provable claim.

Colman vs. Withoft, 195 Fed. 250, 28 A. B. R. 328 (9 C. C. A.).

Only creditors proving an indebtedness due at the time of bankruptcy have the right to vote.

Remington on Bankruptcy, Sec. 573.

Brief of appellee, page 5, says his claim was filed with the Referee on the 21st day of September, 1921, whereas appellant had given the date of filing as September 10th, 1921. We accept this correction.

Brief of appellee, page 10, points out a typographical error in the record, pages 12 and 13, where the order of the District Judge refers in two places to July 1st, 1921, whereas the order should be July 21st, 1921. This correction should be made.

ARGUMENT.

I.

The first question presented by this appeal involves the meaning of Sec. 1203-1 of Rem. Comp. Stat. (Washington). Since the writing of our opening brief this statute has been construed by the Supreme Court of the State of Washington in *Culp vs. McMehan,* decided February 10, 1923, reported in Vol. 23, No. 6, page 339, Washington Decisions.

On December 14, 1921, Culp brought suit to foreclose a landlord's lien for rent due for the prior month of August and September on certain property purchased by McMehan at a receiver's sale. The court said:

> "The first question to be considered involves the meaning of Sec. 1203-1 of Rem. Comp. Stat., which, in so far as it is material to the question involved, provides:
>
> 'Any person to whom rent may be due, * * * shall have a lien for such rent which is paramount to, and has preference over, all other liens. Such liens shall not be for more than two months' rent due or to become due, nor for any rent or any installment thereof which has been due for more than two months.'

> The action was brought on December 14, 1921, to foreclose the lien for rent due for the prior months of August and September, which rent, under the terms of the lease, was payable in advance, thus becoming due on the first day of each such month.
>
> The appellants argue that the provisions of the statute quoted should not be construed as limiting the time within which an action to enforce a landlord's lien must be brought, but should be construed as restricting the right of lien to cover a two months' period. We cannot accept this view. The statute could possibly be held to bear that meaning were it not for its last provision, namely, the provision reading 'nor for any rent or any installment thereof which has been due for more than two months.' This provision is clear and explicit and, in our opinion, leaves no room for doubt as to the meaning of the statute; it means that the lien is not enforceable unless the action herefor is brought within two months of the time the rent which it is sought to recover becomes due."

In the case at bar the court allowed rent from June 1, 1921, to July 21, 1921, (date of filing petitions in bankruptcy) at the rate of $375.00 per month as a preferred claim (R. 13).

The lease provides that the June rent was payable on the first day of June and the July rent was payable on the first day of July, 1921. (See lease on file under stipulation of counsel.)

For the June rent the landlord had a lien for two months or until the first day of August, and for

the July rent he had a lien for two months or until the first day of September. After September 1st the life of both liens had run and thereafter ceased to exist.

On September 21, 1921, appellee filed his claim with the Referee. At that time (Sept. 21, 1921) the June rent was three months twenty days past due and the July rent was two months and twenty days past due. The lien had expired through failure to foreclose in the State Court or in the Bankruptcy Court within two months after the rent became due.

Appellee contends that he may file his claim as a preferred claim for rent within two months of the institution of the bankruptcy proceedings. The answer to this is the statute itself, which provides that the action must be instituted *within two months of the time the rent became due.* In this case the rent became due on June 1st and July 1st, and the lien for same expired on August 1st and September 1st, respectively. If appellee's contention were true he could claim a lien for rent due in 1918 or 1919 or 1920, provided he filed his claim in the bankruptcy court within two months of bankruptcy proceedings instituted in 1921. This contention of appellee is expressly denied in the *Culp* case just

decided by the Supreme Court and by the cases cited therein.

A second ground for denying appellee a preferred claim is that his claim was filed as a general, unsecured claim and this was a waiver of the right to a lien. See appellant's opening brief, pages 9 and 10.

A third ground for denying appellee a preferred claim for rent from June 1st to July 21, 1921, is that the Washington statute does not give a lien on any specific assets and that the lien is inchoate until foreclosure proceedings are commenced to perfect it. Such liens as are given by the Washington statute have been held to be inchoate and, unless foreclosure is brought prior to bankruptcy proceedings, such a lien is inferior and subordinate to the lien conferred upon the Trustee in Bankruptcy under the amendment of 1910 to Sec. 47a (2).

Henderson vs. Mayer, 225 U. S. 638; 32 Sp. Ct. 699, 56 L. Ed. 1233.

So. Ry. Co. vs. Wilder, 231 Fed. 933 (C. C. A. 5).

Pretorius vs. Anderson, 236 Fed. 725 (C. C. A. 5).

That the Trustee has a lien upon all assets in his possession under Sec. 47a (2) as amended by the amendment of 1910 has been held by this court:

Pac. State Bank vs. Coats, 205 Fed. 618.

Meier & Frank vs. Sabin, 214 Fed. 231.

Scand. Am. Bank vs. Sabin, 227 Fed. 579.

The Trustee believes that the above three legal grounds, or any one of them, sufficient to defeat the landlord's claim as a preferred claim from June 1st to July 21, 1921. The claim should be allowed as a general, unsecured claim only.

II.

Brief of appellee, page 4, says there are two classes of secured claims and that the claim for rent after date of bankruptcy was an expense of administration and should be paid in full. This is not questioned by the Trustee in Bankruptcy. From July 21, 1921, (date of filing involuntary petitions in bankruptcy) to October 1, 1921, the claim for rent is entitled to priority of payment as an expense of administration, and the Trustee has always been willing to allow it and to pay it in full in such sum as the court may allow. Under the Washington statute above quoted appellee could claim a land-

lord's lien from July 21, 1921, to Oct. 1, 1921. It is immaterial whether the claim for said period is allowed as an expense of administration or as a lien claim. In either event, the Trustee is willing to pay it in full in such sum as the court may allow.

As to this part of appellee's claim the only question raised by the appeal is as to the amount of the claim. The Trustee claims that $100.00 per month is the fair market value of the premises when used for temporary purposes. The court below fixed the reasonable rental value at $300.00 per month.

As in his opening brief, pages 13 and 14, appellant contends that the only evidence of value of said premises for a temporary purpose was given by witnesses for the Trustee and fixed by them at $100.00 per month. The evidence establishes that the premises would have remained vacant and the landlord would have lost the entire amount of his rent. Bankruptcy cases are equity proceedings in which the equities of all parties should be considered and adjusted.

Bardes vs. Bank, 178 U. S. 533.

In re. Waugh, 133 Fed. 281 (9 C. C. A.).

It seems just and equitable that the landlord should bear part of the loss entailed by this bankruptcy rather than that he should be paid in full and the entire loss fall upon all the other creditors.

Appellee argues that the Trustee might have moved the merchandise and fixtures to a cheaper location. In this case, as in all cases, the Trustee continued in possession in order to sell the business as a going concern and to take advantage of the good will attaching to the business. It is one thing to sell a business as it stands in its place of business and another thing to move the goods to a place of storage and there sell them as junk or piecemeal. The usual and ordinary course of procedure is for the Trustee to advertise for bidders and his most likely prospects are those who wish to go into business permanently or to take over the premises and sell off the goods at special sale. The landlord in this case blocked such a course and prevented the Trustee from selling the busines as a business by leasing the premises on September 1st, and giving the lessee the right of occupancy on October 1st (R. 28-29).

Also, the record shows that the assignee notified the landlord that he could have the occupancy of

the front room of the premises in July (R. 21). The new lessee actually moved his goods into the front room about the middle of September (R. 25). In every case where a merchant moves his goods into a new location it takes time to assemble the cases of merchandise and the fixtures, to open the merchandise, set up the fixtures and make ready for business. This course was followed in this case at the expense of the Trustee in Bankruptcy.

We believe the equities of the case are with the Trustee and that the estate ought not be consumed by expenses of administration. Estates must be economically administered.

Rem. on Bankruptcy, Sec. 24.

III.

Brief of appellee, page 9, says there is no testimony in the record showing that the appellee had collected rent from Oct. 1st to the first of the year from the new tenant, Mr. Simon. The record shows that the lease was entered into on the first of September and was to commence October 1st (R. 27).

Appellee's agent testified:

> "The lease to Simon is a five year lease at $350.00 a month, payable monthly in advance,

> of which Mr. Simon has paid the first and last month's rent. It was executed September 1st, 1921, and commenced to rent from October. Mr. Simon has already paid his rent up to the first of January." (R. 28-29.)

The record plainly shows that these premises were leased to one Simon and that the lease was executed September 1st and was effective October 1st. On October 1st Simon was lessee of said premises and entitled to their possession. He had moved into the front part of the store the middle of September and after October 1st the premises were Simon's under his lease.

The avarice of landlords has lead to the characterization of "landlord hog." We cannot think that the Trustee can be forced to pay rent after October 1st to a landlord who has parted with title to the premises by executing a lease to a new lessee effective October 1st; that the landlord can collect from said lessee and again from the trustee.

The claim filed was for June, July, August and September rent. It made no claim to rent for any part of October. No amended claim was filed. Such claim must be made in writing and sworn to.

Remington on Bankruptcy, Sec. 614.

The allowance for Oct. 1-5 is not warranted by the proof of claim.

CONCLUSION.

Appellant respectfully submits that the claim of appellee should be allowed as follows:

June 1 to July 21, General Claim	$628.89
July 21 to Oct. 1, Trustee's Expense of Administration at $100 per mo.	233.33
Oct. 1 to Oct. 5, Claim Disallowed (Premises leased Oct. 1.)	00.00

Respectfully submitted,

LOGAN ROBERTS,

ROBERTS & ROBERTS,

NELSON R. ANDERSON,

Attorneys for Appellant.